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MCLE SELF-STUDY

Can Local Governments Be Subjected to Treble Damages for Misuse of Federal Funds?

By Mark R. Troy, Esq. *

Since 1986, over 4000 federal lawsuits¹ have been filed under the civil False Claims Act² ("FCA"), a Civil War era law enacted to combat fraud by recipients of federal funds. The original enactment of 1863, as well as the 1986 amendments that significantly enhanced the scope of liability and recoverable damages, primarily targeted large contractors who sold the government defective or fraudulently priced military products.³ In recent years, however, the federal government's enforcement efforts have focused on overcharging by healthcare providers and other businesses tendering medical services and products paid for under the Medicare system.⁴ Moreover, enforcement litigation has even been initiated against local governments that receive federal funds for medical treatment, medical research, education and housing grants, environmental clean-up projects and disaster relief.

This Term, in *Cook County, Ill. v. U.S. ex rel. Chandler*,⁵ the Supreme Court will decide whether local governments can be sued under the FCA for misuse of federal funds. The decision will affect the manner in which local governments are held accountable to their federal agency benefactors and,

consequently, whether local taxpayers will bear the statute's severe financial punishment for the misdeeds of their local leaders.

I. OVERVIEW OF THE FALSE CLAIMS ACT

The FCA applies to any "person" who "knowingly presents ... the United States Government ... a false or fraudulent claim for payment or approval" A violation is punishable by a civil penalty between \$5k and \$10k plus three times the amount of damages sustained by the federal government.⁶ The term "claim" is also defined broadly as "any request or demand, whether under a contract or otherwise, for money or property which is made to a contractor, grantee, or other recipient if the United States Government provides any portion of the money or property which is requested or demanded"⁷

While the FCA is intended to punish fraud perpetrated on the federal government, the statute does not require proof of a specific intent to defraud. Rather, the required level of scienter resembles more of a gross negligence standard. In that regard, "knowingly" making a false claim is defined as having "actual knowledge" of the falsity of the

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claim, or acting with “deliberate ignorance” or “reckless disregard” as to the truth or falsity of the claim.⁸ The statute requires proof merely by a preponderance of the evidence rather than the stricter “clear and convincing” standard applicable to many fraud related claims.

Since 1986, the federal treasury has recovered more than \$10 billion under the FCA.⁹ Over half of that money was recovered in cases initiated by whistleblowers under the statute’s so-called “qui tam” provisions, which permit an individual (often referred to as a “relator”), to file suit in the name and on behalf of the federal government.¹⁰ If the relator’s action results in recovery for the federal government, the relator receives a portion of the proceeds together with attorney fees.¹¹ Typically, relators are current or former employees of the defendant who have observed and reported the fraud. Often the relator claims to have been retaliated against or terminated from employment for having complained about the alleged conduct.

While the United States Department of Justice can intervene in a qui tam action and thereby take over prosecution of the matter, the statute affords the relator the right to pursue the litigation even if the DOJ declines to do so.¹² As the Supreme Court has observed, federal officials often utilize administrative remedies to resolve financial disputes with government contractors and otherwise employ a degree of prosecutorial discretion, but qui tam relators are motivated primarily by pecuniary self-interest.¹³ In many instances, relators have pursued litigation in the name of the federal government when, in fact, the federal government, upon investigation of the matter, concluded that the allegations were without merit.¹⁴

Lawsuits brought under the FCA – whether brought by the federal government or by qui tam relators – pose substantial financial risks for defendants. When the mechanics by which the defendant sought payment or reimbursement involve submission of numerous requests for payment over a lengthy period of time (such as monthly invoicing), the penalties for an ongoing violation can easily reach into six figure sums.¹⁵ Similarly, because federally funded projects often involve large sums of money, the mandatory treble damages penalty can be quite large.

Because the FCA does not explicitly limit the kinds of corporations that may be sued, in recent years a handful of actions have been filed against States and municipalities in their capacity as recipients of federal grants and other forms of federal funding. In most instances, the actions were filed not by the federal government but by current or former employees of the defendant agencies. The allegations involved misuse of federal funds for medical treatment, medical research, education and housing grants, environmental clean-up projects and disaster relief.

In 2000, the Supreme Court held that States and their agencies, as sovereign entities, are not “persons” under the FCA and therefore are not subject to FCA liability.¹⁶ The Court further stated that the FCA’s treble damages provision is “essentially punitive in nature,” thereby giving rise to a presumption against imposing punitive damages on governmental entities.¹⁷ Now the Court will decide whether the same result applies to municipal governments.

II. CIRCUIT COURT SPLIT

Three federal appeals courts have considered whether local governments are subject to FCA liability.¹⁸ The following summarizes their holdings.

Seventh Circuit. In *U.S. ex rel. Chandler v. Cook County, Ill.*,¹⁹ the case now pending before the Supreme Court, the qui tam relator was the director of a medical research and treatment program conducted by a hospital run by Cook County, Illinois. The county received federal grant assistance for the program, which involved the treatment of drug addicted pregnant women. The relator alleged that the hospital had falsely certified to the federal government that it was in compliance with federal regulations and that it had submitted false progress reports.

The Seventh Circuit Court of Appeals held that a local government constitutes a “person” within the meaning of the FCA and can be liable under the statute. The court based this holding on the absence of an express exemption for local governments. It also relied upon a provision in the statute authorizing the federal government to pursue discovery, prior to filing an FCA action, against political subdivisions of a State.

With regard to the common-law presumption that local governments are immune from punitive damages, the Seventh Circuit considered whether the purpose of such immunity was consistent with the FCA. While noting that damages would be “borne by the very taxpayers and citizens for whose benefit the wrongdoer [is] being chastised,” the court emphasized that it is the local taxpayers who have been enriched by the fraudulent conduct.²⁰

Fifth Circuit. In *U.S. ex rel. Garibaldi v. Orleans Parish School*,²¹ the qui tam action was filed by the audit director of the Orleans Parish School Board. He alleged that over an eleven year period the Board’s risk management department had submitted 1500 false claims to the federal government by charging substantially higher insurance rates (for unemployment and workers’ compensation insurance) to the federally financed programs. A jury found in favor of the relator and awarded the federal government \$7.6 million in damages, which the court trebled to \$22.8 million. The trial court also imposed a civil penalty of \$7.85 million, the result of 1570 false claims multiplied by \$5,000.

The Fifth Circuit Court of Appeals recognized that local governments do not enjoy the same sovereign status as States. However, rather than focusing on whether a local government is a “person” under the FCA, it jumped to the punitive damages aspect of the law. Applying somewhat circular reasoning, the Fifth Circuit concluded that, because local governments are presumably immune from actions for punitive damages, the fact that the FCA mandates punitive damages demonstrates a congressional intent that the statute not be applied to local governments.

Third Circuit. In *U.S. ex rel. Dunleavy v. County of Delaware*,²² the relator was a consultant to Delaware County as to regulations governing federal Housing and Urban Development funding grants. He alleged that the County utilized federal funds to purchase land for a park expansion and then sold that land and kept the proceeds.²³ The Third Circuit Court of Appeals considered the question of whether Congress clearly manifested its intention under the FCA to abrogate local government common-

law immunity from punitive damage awards. It found nothing in the text or the history of the statute to suggest such an intent. Rather, employing circular reasoning similar to that of the Fifth Circuit, the Third Circuit held that Congress' imposition of treble damages is "powerful evidence that Congress did not intend to subject local governments to punitive damages under the FCA."²⁴

III. QUESTIONS BEFORE THE SUPREME COURT

In *Chandler*, the Supreme Court will resolve whether local governments, like private corporations, are considered "persons" subject to suit under the FCA. If that query is answered in the affirmative, then the court will address whether the FCA's treble damages provision renders local governments immune from liability. Underlying these statutory construction questions are the policy questions of how best to remedy improprieties in federally funded municipal programs and whether local taxpayers should be called upon to bear the burden of a treble damages award that could result in higher tax assessments and further decreases in municipal services.

In the event the Supreme Court holds that local governments are immune from FCA liability, there will be little, if any, impact on the federal government. Each federal agency has a host of administrative regulations under which to pursue the return of funds paid under false pretenses. Should the federal government desire to pursue a fraud remedy, it can certainly avail itself of numerous common-law fraud causes of action.

CONCLUSION

The Supreme Court has the opportunity to interpret the FCA in a manner that bars qui tam relators from filing actions against local governments. Employees of local governments could still report misuse of federal funds, but they would not be permitted to file suit in the name of the federal government, nor would they be entitled to a monetary reward. Thus, immunizing local governments from qui tam actions would not adversely affect the federal government's recovery of misused funds from local governments and would have the additional positive effect of sparing local governments from costly and often fruitless litigation.

ENDNOTES

- 1 Fed. Contract Rpt., Vol. 78, No. 23, p. 715 (Dec. 24, 2002).
- 2 31 U.S.C. § 3729 et seq.
- 3 *United States v. Bornstein*, 423 U.S. 303, 309 (1976).
- 4 Fed. Contract Rpt., Vol. 78, No. 23, p. 715 (Dec. 24, 2002).
- 5 122 S.Ct. 2657 (2002).
- 6 31 U.S.C. § 3729(a).
- 7 Id. § 3729(c).
- 8 Id. § 3729(b).
- 9 Fed. Contract Rpt., Vol. 78, No. 23, p. 715 (Dec. 24, 2002).
- 10 31 U.S.C. § 3730. The term "qui tam" is short for a Latin phrase that is translated as "who brings the action as well for the king as for himself." U.S. ex rel. *Kelly v. Boeing Co.*, 9 F.3d 743, 746 (9th Cir. 1993). For a detailed history of the origin of qui tam actions and how they have slowly become a disfavored method of seeking governmental redress, see J. Randy Beck, "The False Claims Act and the English Eradication of Qui Tam Legislation," 78 N.C. L. Rev. 539 (2000).
- 11 31 U.S.C. § 3730(d).
- 12 Id. § 3730(c)(3).
- 13 *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 949 (1997) (Qui tam relators, "motivated primarily by prospects of monetary reward rather than the public good . . . are thus less likely than is the Government to forgo an action arguably based on a mere technical noncompliance with reporting requirements that involved no harm to the public fisc").
- 14 Id. at 943 n. 1 (government concluded that the conduct alleged by the relator to be wrongful actually benefited the government). See also U.S. ex rel. *Lindenthal v. General Dynamics Corp.*, 61 F.3d 1402, 1412 (9th Cir. 1995) (despite relators' claims of defendant's deficient contract performance, Air Force personnel testified that defendant had met government's expectations).
- 15 E.g., *Ab-Tech Construction, Inc. v. United States*, 31 Fed. Cl. 429 (1994) (notwithstanding the lack of any monetary harm caused by contractor's false certification that it was a small business, the court applied a penalty for each one of the contractor's monthly invoices).
- 16 *Vermont ANR v. U.S. ex rel. Stevens*, 529 U.S. 765 (2000).
- 17 Id. at 784-85.
- 18 The Ninth Circuit has not yet considered the question of local government immunity from the False Claims Act. Opposite conclusions were reached by two district courts within the Central District of California. In *United States ex rel. Giles v. Sardie*, No. CV-96-2002 LGB, 2000 U.S. Dist. LEXIS 21068 (C.D. Cal. Aug. 1, 2002), Judge Baird held that the Supreme Court's "discussion" in *Stevens* of the punitive nature of damages in the Act was not "central to the holding in that case." Judge Baird essentially concluded that the damages are not punitive, and therefore, there is no applicable presumption of immunity for local governments. In contrast, Judge Feess, in *United States ex rel. Satalich v. City of Los Angeles*, No. CV 00-08882 GAF, 2001 U.S. Dist. LEXIS 13934 (C.D. Cal. Aug. 31, 2001), disagreed with Giles, concluding that the Supreme Court was unambiguous in holding that the Act's damages provision is punitive.
- 19 277 F.3d 969 (7th Cir. 2002).
- 20 Id. at 978 (internal quotations and citation omitted).
- 21 244 F.3d 486 (5th Cir. 2001).
- 22 279 F.3d 219 (3rd Cir. 2002).
- 23 *Dunleavy* is an example of qui tam litigation pursued in the name of the United States where the relator's interest was adverse to that of the United States. The federal government not only declined to intervene in the action, it informed the court that no fraud had been committed. At the same time, HUD successfully utilized its administrative remedy to demand that the County return the funds. The County complied with HUD's demand. Under the qui tam provisions, however, that resolution did not put the litigation to rest. Rather, the relator was left to pursue the false claims allegations on his own despite the fact that the federal government's own claim had been satisfied.
- 24 *Dunleavy*, supra note 22 at 225.

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MCLE SELF-ASSESSMENT TEST

1. The False Claims Act was originally enacted during World War II to combat fraud by defense contractors.
☐ True ☐ False
2. Doctors who inflate Medicare reimbursement claims are not subject to liability under the False Claims Act.
☐ True ☐ False
3. State governments that misuse federal grant funds are immune from liability under the False Claims Act.
☐ True ☐ False
4. A “knowing” violation of the False Claims Act includes having “deliberate ignorance” of the truth or falsity of the claim.
☐ True ☐ False
5. Because the False Claims Act is considered a “fraud” statute, for a person to be liable, he or she must have had a specific intent to defraud the federal government.
☐ True ☐ False
6. The term “claim” under the False Claims Act is defined broadly to include any request or demand for money or property from the federal government.
☐ True ☐ False
7. A qui tam relator who initiates a False Claims Act action on behalf of the federal government must dismiss the action if the federal government believes the case lacks merit.
☐ True ☐ False
8. Most qui tam relators are current or former employees of the defendant.
☐ True ☐ False
9. The False Claims Act requires proof of fraud by clear and convincing evidence.
☐ True ☐ False
10. Over \$10 billion has been recovered by the federal treasury under the False Claims Act since 1986.
☐ True ☐ False
11. If a qui tam action is successful, the relator receives a portion of the federal government’s damages.
☐ True ☐ False
12. If a qui tam action is unsuccessful, the relator recovers his or her attorneys’ fees nevertheless.
☐ True ☐ False
13. The Supreme Court has observed that qui tam relators are motivated primarily by the prospects of monetary reward.
☐ True ☐ False
14. In the case now pending before the Supreme Court, the Seventh Circuit Court of Appeals held that local governments are subject to liability under the False Claims Act.
☐ True ☐ False
15. If a local government is held liable under the False Claims Act, the State pays the damages.
☐ True ☐ False
16. The Supreme Court has already held that the False Claims Act’s treble damages provision is essentially punitive in nature.
☐ True ☐ False
17. One question pending before the Supreme Court is whether a local government is considered to be a “person.”
☐ True ☐ False
18. If a defendant submitted ten false claims, he or she would nevertheless be liable only for one penalty of between \$5k and \$10k.
☐ True ☐ False
19. Although the Ninth Circuit has not ruled on whether local governments are subject to the False Claims Act, district courts within the Ninth Circuit agree that local governments are immune from liability.
☐ True ☐ False
20. If the Supreme Court decides that local governments are immune from False Claims Act liability, the federal government would still be able to pursue common-law fraud remedies against local governments for misuse of federal funds.
☐ True ☐ False

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The Limits of Procedural Due Process in Legislation

By Peter E. von Haam, Esq.*

Plaintiffs wishing to avoid the impact of legislative action sometimes challenge the constitutionality of the procedural aspects of the decision. Such “procedural due process” attacks are often added to more substantive causes of action in a complaint or petition for writ of mandate. In addition, this line of argument is used in attempts to get temporary injunctive relief from courts on an ex parte basis.

Public lawyers frequently have insufficient notice to research and brief such matters on an ex parte basis, which makes it important to have the basic principles in one’s “back pocket.” This is all the more true given the emotional appeal of procedural due process claims arising in the wake of a governmental decision purportedly harming a citizen who had insufficient notice of the action.

I. EARLY CASE LAW

Due process principles require reasonable notice and opportunity to be heard before governmental deprivation of a significant property interest.¹ Long ago, however, federal courts circumscribed this requirement to apply only to *adjudicatory* acts. If the governmental act is *legislative* in character, notice and opportunity to be heard are not constitutionally required. As Justice Holmes wrote for the Supreme Court in 1915:

“Where a rule of conduct applies to more than a few people it is impracticable that every one should have a direct voice in its adoption. The Constitution does not require all public acts to be done in town meeting or an assembly of the whole. General statutes within the state power are passed that affect the person or property of

individuals, sometimes to the point of ruin, without giving them a chance to be heard. Their rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule.”²

II. LEGISLATIVE VS. ADJUDICATORY FUNCTIONS

In assessing the applicability of procedural due process requirements, the public lawyer must first determine whether the governmental act in question is legislative or adjudicatory. In some contexts the distinction is obvious. When a state agency adopts regulations for publication in the California Code of Regulations, for example, it clearly is exercising its quasi-legislative power. Conversely, when the same agency utilizes an administrative law judge to conduct evidentiary hearings before imposing sanctions or issuing or revoking a license, it is acting in its quasi-judicial capacity. Many cases arise, however, where it is not entirely clear if an act is legislative or adjudicatory in nature.

Much of the state case law on this topic involves land-use decisions. In *San Diego Bldg. Contractors Assn. v. City Council*,³ the California Supreme Court ruled that the enactment of a city zoning ordinance by initiative was legislative in character, thus requiring no prior notice and hearing, even though it was likely that the ordinance would deprive persons of significant property interests. In so holding, the court distinguished “adjudicatory” matters in which “the government’s action affecting an individual (is) determined by facts peculiar to the individual case” from “legislative” decisions which involve the adoption of a “broad, generally applicable rule of conduct on the basis of a general public policy.”⁴

By contrast, in *Horn v. Ventura County*,⁵ the California Supreme Court ruled that a county’s approval of a subdivision was an adjudicatory rather than a legislative act. The question before the court was whether approval by the county of a tentative subdivision map was an adjudicatory function that, under principles of due process required both appropriate notice to, and an opportunity to be heard for, persons whose property interests might be significantly affected.

In this case, Osborne, a real party in interest, applied to the county planning department for approval of a subdivision of his property into four lots. The planning department prepared a negative declaration under the California Environmental Quality Act, which declared that the project would not have a significant effect on the environment. Thereafter, the department conditionally approved the tentative map without giving notice to owners of the adjoining properties. Horn, the petitioner, subsequently purchased adjoining property and requested a noticed public hearing on the proposal but the county refused.

In his complaint, Horn claimed that the proposed subdivision was topographically unsuited to residential construction, that its design would create substantial traffic and parking congestion, and that the county’s environmental assessment was inadequate. Urging that the county exceeded its jurisdiction by approving the project without affording constitutionally adequate notice and hearing procedures to affected landowners, the petition sought a judgment setting aside the decision. The trial court granted a general demurrer to the county, and Horn appealed.

Horn argued that the subdivision approval constituted an adjudicatory act of local government such that those persons affected by the action were constitutionally entitled to notice and a hearing prior to the final decision. In response, citing *County of San Mateo v. Palomar Holding Co.*,⁶ the county characterized its action as legislative, requiring no prior notice and hearing.

The California Supreme Court distinguished the Palomar case on the basis that it involved non-discretionary rejection of subdivision maps that did not comport with the Subdivision Map Act and conforming ordinances. By contrast, it noted that approval of subdivisions under the Subdivision Map Act or the county's subdivision ordinance require *discretionary* consideration of factors such as topography, density, public health and access rights, or community land use plans, as well as environmental evaluation under CEQA. The court reasoned:

“Resolution of these issues involves the exercise of judgment, and the careful balancing of conflicting interests, the hallmark of the adjudicative process. The expressed opinions of the affected landowners might very well be persuasive to those public officials who make the decisions, and affect the outcome of the subdivision process.”⁷

The court thus ruled that the subdivision approval was an adjudicatory act requiring prior notice and hearing to landowners whose property could be substantially affected by the decision. The court reiterated, however, that purely ministerial government acts, even if affecting a property interest, do not trigger adjudicatory due process considerations. In addition, it emphasized that agency decisions having only a de minimus effect on land do not trigger constitutional notice and hearing requirements.

III. LC&S, INC. V. WARREN COUNTY AREA PLANNING COMMISSION⁸

A more recent case from the Seventh Circuit Court of Appeals provides an example where the court determined a local use decision to be legislative in character. In *LC&S, Inc. v. Warren County Area Planning Commission*, Judge Posner sets forth a comprehensive overview of the legislative/adjudicatory function debate. In this case, plaintiffs had obtained from the State of Indiana a liquor license for use in the rural town of Williamsport. They leased a building in anticipation of opening a restaurant in a part of town zoned for commercial use, a designation allowing operation of a “tavern” without need for a discretionary permit.

Before the business opened, rumors (which proved to be unfounded) circulated that the restaurant would be a topless bar or a gay bar. Local opposition mounted, resulting in passage of a town ordinance making taverns “special exceptions” to the uses permitted in the commercial zoning district. This amendment meant that the plaintiffs would have to apply to the county planning commission's board of zoning appeals for permission to operate their business.

Neither the planning commission nor the town council notified the plaintiffs of the change in the ordinance. When the plaintiffs appeared before the board of zoning appeals, their request for a special exception was denied. They then filed a federal constitutional suit claiming the zoning ordinance amendment had deprived them of property without due process of law.

The plaintiffs argued that the amendment, though normally a legislative act, should be treated as adjudicatory because it was aimed solely at them and effectively constituted an adverse “judgment” based on a “finding” that they intended to open a topless or gay bar. To complete the due process argument, they claimed the ordinance deprived them of their property right granted by the state to sell liquor.⁹

The Seventh Circuit concluded that despite the “targeting” of the ordinance toward one person, it continued to maintain the essential character of a legislative act. In the decision, Judge Posner provides an insightful examination of the fundamental distinction between legislative and adjudicatory acts:

“‘Legislative due process’ seems almost an oxymoron. Legislation is prospective in effect and, more important, general in its application. Its prospective character enables the persons affected by it to adjust to it in advance. Its generality offers further, and considerable, protection to any individual or organization that might be the legislature's target by imposing costs on all others who are within the statute's scope. ... The right to notice and a hearing ... are substitutes for the prospectivity and generality that protect citizens from oppression by legislators and thus from the potential tyranny of electoral majorities.”¹⁰

In the case before it, the court concluded that although the ordinance clearly was intended to “target” the plaintiffs, that fact did not establish that the amendment was not a bona fide legislative measure. It operated prospectively only, regulating a future use but not imposing a sanction for past conduct. The fact that the ordinance in effect applied only to one individual was not dispositive:

“It is utterly commonplace for legislation to be incited by concern over one person or organization. The Sherman Act, for example, was intended in large measure to curb John D. Rockefeller's Standard Oil Trust, and, sure enough, some years after it was passed a successful suit was brought under it to dismember the trust.”¹¹

Thus, the court stated that not the motive of an enactment, but the generality and consequences of governmental action, determine whether it is really legislation or something else. The court concluded that the Williamsport ordinance was bona fide legislation, and hence no notice or opportunity to be heard was constitutionally required.

IV. STATUTORY NOTICE RIGHTS

The lack of procedural due process rights in legislation does not leave the public without safeguards to remain informed about and participate in the legislative processes of government. At the level of state government, the Bagley-Keene Act¹² sets forth minimum notice requirements for the meetings of state boards, commissions and other bodies. The statute provides for posting of a reasonably detailed agenda and opportunity for members of the public to address the body on individual agenda items. The Brown Act¹³ imposes similar requirements on local governmental entities.

Other statutes impose notice requirements in more specific circumstances. CEQA sets forth public notice and review procedures for governmental decisions involving potential environmental impacts.¹⁴ In addition, many local ordinances require notice to property owners within a certain distance from a proposed development or to citizens who have requested information on a certain topic.

CONCLUSION

When defending a claim that a government entity has violated "legislative due process" rights, the public lawyer should quickly remind the court of the inapplicability of constitutional due process principles to legislative acts and shift the focus to compliance with the many potentially applicable notice requirements set forth in statute.

In most cases, the crucial issue to clarify is whether the government decision is legislative or adjudicatory in nature. As the two cases discussed in detail above illustrate, the distinction usually turns on: (1) the generality or specificity of the action; (2) the prospective or retroactive effect of the decision; and (3) the amount of discretion the government entity exercises in considering

subjective or individualized factors. If the action can correctly be characterized as adjudicatory, constitutional notice and hearing requirements apply. If the decision is legislative, applicable statutes set forth the thresholds for notice and public participation.

ENDNOTES

- 1 U.S. Const., 14th Amend.
- 2 Bi-Metallic Co. v. Colorado, 239 U.S. 441, 445 (1915).
- 3 13 Cal.3d 205 (1974).
- 4 Id. at 212-3.
- 5 24 Cal.3d 605 (1979).
- 6 208 Cal.App.2d 194 (1962).
- 7 Horn, *supra* note 5 at 615.
- 8 244 F.3d 601 (2001).
- 9 Id. at 604.

- 10 Id. at 602-603.
- 11 244 F.3d 601, 604.
- 12 Cal. Gov.C. § 11120 et seq.
- 13 Id. § 54950 et seq.
- 14 E.g., Cal. Pub.Res.C. § 21092; 14 Cal.Code of Regs. § 15072 (public notice requirements regarding proposed negative declarations).

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If so, that person could be the recipient of the Public Law Section's "2003 Outstanding Public Law Practitioner" award because of your nomination.

Each year the Public Law Section honors a public lawyer selected by the Public Law Section Executive Committee from nominations sent in by members of the Public Law Section, the State Bar, and the public at large.

For the award, the Public Law Section Executive Committee is looking for an active, practicing public lawyer who meets the following criteria:

1. At least 5 years of recent, continuous practice in public law.
2. An exemplary record and reputation in the legal community.
3. The highest ethical standards.

Rather than a political figure or headliner the ideal recipient would be a public law practitioner who has quietly excelled in his or her public service. Just as the Public Law Section Executive Committee supports the goal of ethnic diversity in the membership and leadership of the State Bar, a goal in selecting the 2003 Outstanding Public Law Practitioner will be to ensure that the achievements of all outstanding members of the Bar who practice public law, especially women and people of color, are carefully considered.

Nominations are now being accepted. The 2003 Outstanding Public Law Practitioner award will be presented at the Annual State Bar Convention in Anaheim in September 2003.

Send nominations, no later than 12:00 midnight, June 1, 2003, to:
Tricia Horan, Public Law Section, State Bar of California, 180 Howard Street, San Francisco, CA 94102-4498

To nominate an individual for this award, fill out the official nomination form below.

Nominee's Name:

Nominator's Name:

Place of Business:

Telephone Number:

Years of Public Law Practice:

Brief statement why Nominee deserves recognition:

California Supreme Court Gives Eminent Domain a Vote of Confidence

by Thomas A. Douvan, Esq., Kevin D. Siegel, Esq. and Benjamin L. Stock, Esq.*

Redevelopment agencies found themselves on the winning side of a California Supreme Court eminent domain decision last November — one that should have wide implications in condemnation proceedings for some time to come.

The First District Court of Appeal published an opinion in *Emeryville Redevelopment Agency v. Harcross Pigments, Inc.*¹ that included many holdings favorable for redevelopment agencies. Two months later, the California Supreme Court denied the property and business owner's petition seeking review or de-publication, thereby sanctioning a landmark change in eminent domain law.

I. PROCEDURAL HISTORY

At issue in the Emeryville case was a 13-acre highly contaminated property. The parcel, once the site of an ancient Indian burial shellmound, had more recently been used as a pigment factory. The Emeryville Redevelopment Agency obtained an order of possession for the property in 1998 and proceeded with a multi-million dollar clean-up effort. The Agency acquired the property for a mixed-use retail, housing, hotel and entertainment redevelopment project.

The trial court, confronted with many difficult decisions regarding the admissibility of evidence, decided the goodwill entitlement issue in the Agency's favor on Harcross Pigments' cross-complaint. Specifically, the court ruled that the condemnee was not entitled to claim lost goodwill when the property upon which its business operated was being valued on the basis of a potential higher and better use that was inconsistent with continued operation of the business.

Some other evidentiary issues were decided against the Agency, however. For example, the trial court excluded evidence of soil contamination remediation cost and its effect on the value of the property, which was particularly surprising given that evidence of groundwater remediation cost had been admitted. Moreover, the trial court allowed evidence of the price paid by the Agency for the purchase of neighboring properties, and permitted Harcross Pigments' appraiser to assign different values per square foot to two different zones of a comparable property straddling the boundary between Emeryville and Oakland. This ruling was based on the theory that the portion in Emeryville was more valuable per square foot. In addition, the trial court allowed the jury to hear extensive evidence of the Agency's redevelopment plans.

The jury awarded Harcross Pigments \$12.5 million. Both parties appealed, challenging the trial court's evidentiary rulings.

II. THE COURT OF APPEAL DECISION

The Court of Appeal declared that when entitlement to goodwill is disputed, the judge, not the jury, must decide whether the condemnee has established entitlement. This is significant because some courts had allowed juries to make entitlement determinations, and the eminent domain jury instructions even include an entitlement instruction. The holding is consistent with the general rule that judges must decide all disputed issues in condemnation cases except for the actual determination of value.

Further, the Court of Appeal upheld the ruling that Harcross Pigments had not established entitlement, and therefore could not present evidence of lost goodwill to the jury. The First District explained that the property owner's claim for lost business goodwill necessarily assumed the property would continue to be used for industrial purposes. However, the property owner simultaneously appraised the property based upon its conversion to a higher and better (i.e., more valuable) use, which necessarily assumed the business would no longer operate on the property. Accordingly, Harcross Pigments could not prove two of the entitlement factors set forth in the Eminent Domain Law: (1) that the loss of goodwill is the result of the taking (because the loss was due to the assumed change in land use), and (2) that it would not receive a compensation windfall by means of a double recovery (because the land uses for the goodwill and property value claims were mutually exclusive).

The Court of Appeal reversed the judgment pertaining to the value of the real estate, fixtures and equipment due to several errors regarding the admission of evidence prejudicial to the Agency. These involved allowing Harcross Pigments to offer evidence regarding Agency purchases of neighboring properties and appraisals based on "zones of value." The admission of evidence of the Agency's redevelopment project also was deemed erroneous.

Finally, the Court of Appeal reversed the award for the fixtures and equipment because it was based on an assumption of a continued use that was inconsistent with the determination of the highest and best use.

III. IMPACT OF THE CASE

So what does all of this mean to redevelopment agencies?

First, it is now established precedent that when there is a dispute over entitlement to claim lost business goodwill, the judge must decide the threshold issues. The jury's only function is to determine the amount of the goodwill loss, if the trial court has determined the business owner established entitlement to present the claimed loss.

The Emeryville case also confirms that evidence of condemnor purchases of comparable properties is inadmissible in condemnation proceedings. A corollary to this principle is that, in analyzing a comparable sale of a property, an appraiser may not assess the comparable property according to purported zones of value. In the Emeryville case, Harcros Pigments' appraiser sought to rely on a provision in the purchase contract that apportioned a higher purchase price to one of the zones of the property in order to assign a different value per square foot than the actual purchase price. This appraisal evidence ran afoul of the statutory prohibition against offering "an opinion as to the value of any property or property interest other than that being valued."² Similarly, the decision forecloses future battles over the introduction of evidence of a condemnor's redevelopment plans when there is no dispute regarding the highest and best use of the subject parcel.

Finally, the Emeryville case clarifies that compounding errors in an eminent domain trial can result in reversible error even though each error might not be by itself prejudicial. As to this issue, the Court of Appeal emphasized that compounding errors can create "a complex network of prejudicial insinuations concerning the Agency's conduct"³ warranting reversal.

The Supreme Court's denial of Harcros Pigments' request to review or de-publish the First District's decision is a major victory for the Emeryville Redevelopment Agency and for other California public agencies having condemnation authority.

ENDNOTES

- 1 101 Cal.App.4th 1083 (2002).
- 2 Cal. Evid.C. §822(a)(4).
- 3 Emeryville, supra note 1 at 1107.

* Thomas A. Douvan (tdouvan@mhalaw.com) is a shareholder, and Kevin D. Siegel (ksiegel@mhalaw.com) and Benjamin L. Stock (bstock@mhalaw.com) are associates, in the Oakland office of McDonough, Holland & Allen. The firm was lead trial and appellate counsel for the Emeryville Redevelopment Agency in the litigation against Harcros Pigments.

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Ten Bills To Watch in 2003

By Brenda Aguilar-Guerrero, Esq. and Mark Sellers, Esq.*

AB 75, NEGRETE MCLEOD

Topic: Public employee post-retirement death benefits: local firefighters.

Last Action: Referred to committee.

Summary: An act to amend Sections 20835, 21460, and 21625 of, and to add Section 2166.5 to, the Government Code, relating to public employees' death benefits. Existing law authorizes contracting agencies of the Public Employees' Retirement System to provide the survivors, as specified, of a deceased, retired, local member an allowance equal to 25% of a specified portion of the deceased member's retirement allowance plus 50% of the remaining portion of the deceased member's allowance. This bill would authorize those contracting agencies to provide the survivors of a deceased, retired local firefighter an allowance equal to 40% of a specified portion of the deceased member's retirement allowance plus 75% of the remaining portion of the deceased member's allowance. This bill would make related technical changes.

AB 76, CORBETT

Topic: Employment discrimination.

Last Action: Read first time.

Summary: An act to amend Section 12940 of the Government Code, relating to unlawful employment practices. Existing law makes it an unlawful employment practice for an employer to harass any employee because of race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, or sexual orientation, or to fail to take immediate and appropriate corrective action to prevent harassment by an employee other than an agent or supervisor, if the employers knows or should have known if this conduct. This bill would make it unlawful for an employer to fail to take immediate and appropriate corrective action to prevent harassment of an employee by any person, once the employer knows or should have known of this conduct.

AB 89, BOGH

Topic: Prevailing wages: payroll records: digitized copies.

Last Action: Referred to committee.

Summary: An act to amend Section 1776 of the Labor Code, relating to prevailing wages. Existing law generally requires contractors engaged in public works to pay employees the prevailing wages, as determined by the Director of Industrial Relations, and to

comply with requirements relating to record-keeping and employee work schedule. Existing law requires each contractor and subcontractor involved in a public works project to keep accurate payroll records containing information about employees, including name, address, social security number, and work history. Existing law requires that certified copies of these payroll records are to be maintained and made available for inspection, as specified, at the principal office of the contractor involved in a public works project. This bill would provide that a certified copy of an employee's payroll record includes a digitized copy of an original payroll record.

AB 92, JEROME HORTON

Topic: City employees: civil service board.

Last Action: Referred to committee.

Summary: An act to amend Section 45004 of the Government Code, relating to city employees. Existing law authorizes the legislative body of any city to establish by ordinance a personnel system, merit system, or civil service system for the selection, employment, classification, advancement, suspension, discharge, and retirement of appointive officers and employees. The legislative body may provide for the appointment of a civil service commission or personnel officer to which it may delegate those powers and duties in relation to the system as it deems advisable. This bill would require the legislative body, when it appoints a personnel commission, to appoint half of the commission members from the public-at-large and to appoint the other half from persons nominated by a recognized employee organization, as specified. The appointed members would be required to appoint an additional member as an independent neutral chairperson.

SB 6, ALPERT

Topic: Public education governance.

Last Action: Referred to committee.

Summary: This bill would: (1) impose a state-mandated local program of requiring each county superintendent of schools to perform additional duties relating to education services, professional development, parental grievances, fiscal oversight, technology access, and facility compliance; (2) establish the California Education Commission to serve as the statewide

education data repository; (3) change the State Board of Education, 10 members appointed by the Governor to require the membership be drawn from and represent distinct geographical regions of the state and to reflect the ethnic and gender diversity of the state's population; (4) change duties of Superintendent of Public Instruction; (5) require the Governor to appoint a cabinet-level officer, known as the Chief Education Officer, to carry out all state-level education operations and programmatic functions, to serve as the ex officio Director of Education; (6) impose a local program by requiring the governing board of a school district to develop and implement policy to effectively operate schools that are responsive to local community needs and to state academic standards/policy priorities; (7) require the Chief Education Officer to assume those rights, duties, and powers; (8) make related changes; (9) recast and revise the statutes relating to the California Postsecondary Education Commission and others; and (10) specify that the California Community Colleges are a public trust and revise the provisions relating to mission of the California Community Colleges and duties of local community college governing boards.

SB 41, BOWEN

Topic: Public contracts: conflict of interest.

Last Action: From printer.

Summary: Existing law prohibits persons, firms, or their subsidiaries who are awarded state contracts for consulting services from submitting a bid or being awarded a contract on or after January 1, 2003, for any action related to the end product of the consulting services contract. This bill would change that date to July 1, 2003. This bill to take effect immediately as an urgency statute.

SB 55, ACKERMAN

Topic: State-mandated local programs.

Last Action: From printer.

Summary: Existing law requires the state to reimburse local agencies and school districts for the cost of state-mandated local programs. This bill would provide that, for the period of January 1, 2004, through December 31, 2005, with specified exceptions, no new state-mandated local program shall become operative unless approved by a 2/3 vote of the Legislature, any state-mandated local program enacted prior to January 1, 2004, shall be suspended unless reenacted by a 2/3 vote of the Legislature, and no local agency shall be required to implement or give effect to any state-mandated local program that is not reimbursed by the state.

SB 58, JOHNSON

Topic: Police reports: confidentiality.

Last Action: From printer.

Summary: Existing law provides a right of privacy and regulates dissemination of

personal information by government agencies (exempting courts from the provisions of the Public Records Act and permits a court to seal records and redact information from them). This bill would provide, except as otherwise required by law, that a police report, arrest report, or investigative report, and any item attached to it, submitted to a court by a prosecutor or law enforcement officer, as specified, be sealed by the court and would permit these records to be inspected, upon request, after the clerk of the court prepares and provides a copy of the report from which all personal identifying information has been redacted, as specified, regarding any witness or victim. This bill to take effect immediately as an urgency statute.

SCA 1, BURTON

Topic: Access to government information.

Last Action: Referred to committee.

Summary: To amend California Constitution to provide people have the right to instruct their representatives, petition government for redress of grievances, and assemble freely to consult for the common good. Various provisions of existing law, including, among others, the California Public Records Act, the Legislative Open Records Act, the Bagley-Keene Open Meeting Act, and the Ralph M. Brown Act, provide, with some exceptions, for public access to government records and meetings of government bodies.

SCA 2, TORLAKSON

Topic: Local government: sales taxes: transportation and smart growth planning.

Last Action: Referred to committee.

Summary: Existing law conditions the imposition of a special tax by a city, county, or special district upon the approval of 2/3 of the voters of the city, county, or special district voting on that tax, and prohibits these entities from imposing an ad valorem tax on real property or a transactions or sales tax on the sale of real property. This measure would authorize a city, a county, a city and county, or a regional transportation agency, with the approval of a majority of its voters voting on the proposition, to impose a special tax for the privilege of selling tangible personal property at retail that it is otherwise authorized to impose, if the tax is imposed exclusively to fund transportation projects and services and smart growth planning, as defined.

* Brenda Aguilar-Guerrero (BAGuerrero@ebhw.com) is a member of Erickson Beasley, et al. Mark Sellers (msellers@toaks.org) is the City Attorney of the City of Thousand Oaks. Ms. Aguilar-Guerrero and Mr. Sellers are members of the Public Law Section Executive Committee and comprise its Legislative Subcommittee.

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New Voting Rights Law May Change the Face of Some Local Government Agencies

By Craig Steele, Esq.*

A newly effective California statute has the potential to change the way some local government agencies elect the members of their governing bodies. The California Voting Rights Act of 2001¹ ("CVRA") applies to cities, school districts, community college districts and other special districts that elect members of their governing bodies either at large, in a "from districts" system,² or in a combined at-large and district based system. The CVRA is intended to enhance the rights of members of language, ethnic and racial groups to elect favored candidates by forcing local agencies to switch from at-large election systems to other systems, potentially including district-based elections, in jurisdictions where minority candidates have not been elected due to racially polarized voting. The theory of the statute is that at-large elections tend to dilute the power of minority voting groups, and that district-based elections and other remedies will enhance the rights of such groups to elect the candidates of their choice.

There are communities in California where this law could effectuate a fundamental shift in the way public officials are elected. At a minimum, jurisdictions with a history of unsuccessful minority candidates or of racially polarized voting may find themselves the target of voting rights litigation under the statute. In either case, lawyers and elections officials for public entities subject to the CVRA should be aware of its provisions, as the reach of the statute is potentially much broader than the federal Voting Rights Act ("FVRA").

I. SUMMARY OF THE CVRA

The basic prohibition of the CVRA is as follows:

"An at-large method of election may not be imposed or applied in a manner that impairs the ability of a protected class to elect candidates of its choice or its ability to influence the outcome of an election, as a result of the dilution or the abridgment of the rights of voters who are members of a protected class"³

This prohibition is limited to at-large elections and does not apply to discriminatory voting qualifications, prerequisites to voting or voting standards, practices and procedures that are banned by the FVRA. However, the CVRA appears to be more expansive than federal law with regard to the political rights protected. Federal law safeguards the rights of all voters to vote, participate in the process and to elect candidates of their choice.⁴ The CVRA, by contrast, secures the rights of certain minority group voters to elect candidates of their choice *and* "to influence the outcome of an election."

If a plaintiff proves that a particular election system violates the CVRA, then the court must "implement appropriate remedies, including the imposition of district-based elections, that are tailored to remedy the violation."⁵ A prevailing plaintiff that is not a public entity may recover reasonable attorney's fees and litigation expenses (public entity plaintiffs are precluded from such recovery). A prevailing defendant may not recover attorney's fees and may only recover costs if the court finds the action to be frivolous, unreasonable or without foundation.⁶

To establish a violation of the CVRA, a plaintiff must show that "racially polarized voting" occurs in governing body elections or in non-candidate elections held in a jurisdiction subject to the statute.⁷ Thus, the results of ballot measure elections could be used to demonstrate "racially polarized voting" to help establish a violation.

For purposes of the CVRA, the term "racially polarized voting" depends upon the identification of a "protected class" of voters who are members of a race, color, or language minority group.⁸ Briefly summarized, the term refers to instances of voting marked by a demonstrable difference between the choice of candidates or other electoral choices that are preferred by members of the protected class and by the rest of the electorate.⁹ The "choices" made by different segments of the electorate can be determined using various statistical calculations sanctioned by courts interpreting the FVRA.

Once a protected class is identified, the CVRA provides a means to demonstrate racially polarized voting in particular jurisdictions:

"One circumstance that may be considered in determining a violation ... is the extent to which candidates who are members of a protected class and who are preferred by voters of the protected class, as determined by an analysis of voting behavior, have been elected to the governing body of a political subdivision that is the subject of an action ... In multiseat at-large election districts, where the number of candidates who are members of a protected class is fewer than the number of seats available, the relative groupwide support received by candidates from members of a protected class shall be the basis for the racial polarization analysis."¹⁰

II. DIFFERENCES BETWEEN CVRA AND FVRA

A plaintiff seeking to establish an unintentional violation of Section 2 of the FVRA, the provision most analogous to the CVRA, must satisfy a threshold burden. Specifically, a federal court will first determine whether minority voters who are politically cohesive (meaning they usually would vote for

the same candidates) also are concentrated in geographic areas of the jurisdiction so that it could be physically possible to draw a single-member district in which such voters could elect the candidate of their choice.¹¹ If it is impossible to draw an effective minority-voting district in a jurisdiction to combat unintentional majority dilution of minority votes, the court generally will look no further under the FVRA analysis.

Perhaps the most significant aspect of the CVRA is that the statute removes this requirement of geographic compactness from the analysis of minority group voting rights. Compared to pre-existing law, the CVRA would treat every potential deprivation of political rights as, effectively, an intentional dilution of minority voting rights. Thus, it appears that a voting rights case under the CVRA will be significantly easier for a plaintiff to win than one brought under the FVRA. A plaintiff can prevail in a CVRA suit simply by demonstrating, based on past election results, that racially polarized voting has occurred in a jurisdiction using an at-large, “from district” or combination election system. The plaintiff does not have to prove discriminatory intent or that it is actually possible for the protected class to constitute a winning voting majority in any hypothetical district. Once a violation is proven, the court must fashion an appropriate remedy that may include a switch to a “by district” election system. Significantly, this mandate conflicts with a statute that requires any change in a general law city’s election system be made by ordinance and approved by the voters.¹²

The CVRA raises fundamental questions regarding the appropriate remedy for “racially polarized voting.” Does the lack of success by a protected class’ favored candidates or issues necessarily mean that voters’ rights have been violated? Does our traditional “one person, one vote” system extend to what appears to be a new statutory right to “influence the outcome of an election” based solely on race, color or language rather than viability of political ideas? The Legislature has answered “yes” to both questions in adopting the CVRA. Now it must be seen whether a state court judge can fashion appropriate remedies for such violations consistent with constitutional rights and other state and federal laws.

CONCLUSION

The passage of the CVRA raises many questions and creates the potential for litigation across the state. Jurisdictions with a history of racial, ethnic or language division in the electoral process therefore should consider changing to a district-based election system. Establishing such a system through the local political process almost certainly is preferable to having it imposed by a court as a result of a CVRA lawsuit.

ENDNOTES

- 1 Cal. Elec.C. § 14025 et seq., effective January 1, 2003.
- 2 A “from districts” election system is one in which candidates for office are required to reside in certain areas of a political subdivision, but are elected by voters from the entire political subdivision. This is different than a “by districts” election system in which candidates are nominated from within certain geographic districts and voted on only by the residents of that district.
- 3 Cal. Elec.C. § 14027.
- 4 42 U.S.C. § 1973.
- 5 Cal. Elec.C. § 14029.
- 6 Id. § 14030.
- 7 Id. § 14028(a).
- 8 Id. § 14026(d).
- 9 Id. § 14026(e).
- 10 Id. § 14028(b).
- 11 This threshold burden arises from *Thornburg v. Gingles*, 478 U.S. 30 (1986). For examples of how the Ninth Circuit Court of Appeals has evaluated the importance of geographic compactness as it relates to minority voting in city council elections, see *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989) (affirming dismissal of complaint brought by African American and Hispanic voters seeking to change Pomona’s at-large voting system to a “by district” voting system) and *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988) (reversing a trial judgment that Hispanic voters were not sufficiently geographically compact to form a district).
- 12 Cal. Gov.C. § 34871.

* Craig Steele (csteele@rwglaw.com) is a shareholder of Richards, Watson & Gershon in the Los Angeles office, and is the City Attorney of the Cities of Agoura Hills and Monrovia. Mr. Steele specializes in elections law.

A Message from the Chair

By Stephen Millich, Esq.*

The Public Lawyer of the Year Award is given annually by the Public Law Section of the California State Bar at a special reception at the State Bar's Annual Meeting. Nominated by peers, the recipient is a public law practitioner who deserves special recognition because of outstanding service.

Immediate past recipients of the Public Lawyer of the Year Award are: Herschel T. Elkins, Senior Assistant Attorney General of the Consumer Law Section (2002); Jayne Williams, former Oakland City Attorney now with Meyers, Nave, Riback and Silver (2001); Prudence K. Poppink, Hearing Officer, California Fair Employment and Housing Commission (2000); and Joanne Speers, then General Counsel and now Executive Director, League of California Cities (1999).

Rather than scramble each year to come up with a source of funding, the Public Law Section will be contacting potential sponsors to establish an endowment with the State Bar Education Foundation so that the Public Lawyer of the Year Award will continue to be awarded annually to deserving public lawyers. If you wish to make your tax deductible contribution before "having the bite put on," please make your check out to The State Bar Education Fund with PLOY on the left bottom corner in an amount you deem appropriate. Sponsors will be recognized at the State Bar Annual Meeting and in the Public Law Journal.

If you have any comments, questions or suggestions, please feel free to e-mail me.

* Stephen Millich (smillich@simivalley.org) is Chair of the Public Law Section Executive Committee. He is Assistant City Attorney to the City of Simi Valley.

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